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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 HANSEN BEVERAGE COMPANY,
12
13 vs. Plaintiff,
14 VITAL PHARMACEUTICAL, INC., a.k.a
15 "VPX," a Florida corporation,
16 Defendant.

CASE NO. 08-CV-1545 IEG (POR)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE A
FIRST AMENDED COMPLAINT**

[Doc. No. 37.]

17 Presently before the Court is Plaintiff Hansen Beverage Company's motion for leave to file
18 its first amended complaint ("FAC.") (Doc. No. 37.) For the reasons explained herein, the Court
19 grants the motion.

20 **BACKGROUND**

21 **Factual Background**

22 Plaintiff Hansen Beverage Co. ("Hansen") brings this action for false advertising against
23 defendant Vital Pharmaceutical, Inc. ("VPX"). Plaintiff produces the "Monster" energy drink and
24 other energy beverages. Defendant produces the "REDLINE Power Rush! 7-Hour Energy Boost"
25 2-ounce energy shot ("Power Rush") and the REDLINE Ultimate Energy Rush ("Redline") energy
26 drink. Plaintiff seeks to amend its complaint based VPX's claims in its recent print
27 advertisements. Specifically, Plaintiff objects to the advertisements' claims that: Redline is
28 "growing 16 times faster than the National Average for Energy Drinks;" AC Nielsen ranked

1 Redline sixth in San Francisco, Los Angeles, and Phoenix, and seventh in Dallas; Redline has
 2 sustained “Over 100 Times the growth rate of REDBULL and MONSTER in L.A.!” and Power
 3 Rush is the “#1 Energy Shot in Los Angeles!” (Motion at 1.) Plaintiff asserts the AC Nielsen
 4 reports VPX cites in its advertisements do not support VPX’s claims. Plaintiff sent VPX a cease
 5 and desist letter to stop the advertisements on January 2, 2009, and received no response. Based
 6 on VPX’s advertising, Plaintiff seeks to add new factual allegations and a cause of action for trade
 7 libel to an FAC.

8 Procedural Background

9 Plaintiff filed suit on August 21, 2008 (Doc. No. 1,) alleging two causes of action: (1)
 10 false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a); and (2) false advertising and
 11 unfair competition in violation of California Business and Professions Code Sections 17200 and
 12 17500. On October 9, 2008, defendant filed an answer to the complaint. (Doc. No. 24.) On
 13 February 27, 2009, Plaintiff filed the instant motion for leave to file an FAC. (Doc. No. 37.)
 14 Plaintiff attached the proposed FAC to its motion. (Ex. B to McIntyre Decl. ISO Motion, Doc. No.
 15 37-3.) VPX has filed a response indicating it does not oppose Plaintiff’s motion. The Court finds
 16 the motion suitable for disposition without oral argument pursuant to Local Civil Rule 7.1(d)(1).

17 DISCUSSION

18 I. Legal Standard

19 Under Fed. R. Civ. P. 15, “a party may amend the party's pleading only by leave of court or
 20 by written consent of the adverse party; and leave shall be freely given when justice so requires.”
 21 Fed. R. Civ. P. 15(a)(2) (2009). “In the absence of any apparent or declared reason—such as undue
 22 delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies
 23 by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance
 24 of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be
 25 ‘freely given.’” Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)
 26 (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). However, “not all of the factors merit equal
 27 weight ... it is the consideration of prejudice to the opposing party that carries the greatest
 28 weight.” Id. at 1052. “Absent prejudice, or a strong showing of any of the remaining Foman

factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.”
Eminence Capital, 316 F.3d at 1052 (emphasis in original). The decision of whether or not to
 grant leave to amend under Rule 15(a) is within the sound discretion of the district court.
California v. Neville Chem. Co., 358 F.3d 661, 673 (9th Cir. 2004).

II. Analysis


The touchstone of the Rule 15(a) inquiry is whether the proposed amendment would
 unfairly prejudice the defendant. Eminence Capital, 316 F.3d at 1052 (emphasis in original). The
 party who opposes amendment bears the burden of demonstrating the prejudice. DCD Programs,
 Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987). In the present case, VPX has not opposed
 Plaintiff’s motion, and therefore has made no demonstration of prejudice. Similarly, there has
 been no strong showing Plaintiff has requested the amendment in bad faith, that Plaintiff has
 unduly delayed in seeking to amend, or that the amendment would be futile.¹ Absent these
 showings, there is a presumption in favor of granting Plaintiff leave to amend under Rule 15(a).
Eminence Capital, 316 F.3d at 1052. Accordingly, the Court grants Plaintiff’s motion for leave to
 file an FAC.

CONCLUSION

For the reasons set forth herein, the Court **GRANTS** Plaintiff’s motion for leave to file a
 FAC. The Clerk shall docket Exhibit B to the Declaration of Edward J McIntyre in support of
 Plaintiff’s motion (Doc. No. 37-3.) as Plaintiff’s First Amended Complaint.

IT IS SO ORDERED.

DATED: April 17, 2009


 IRMA E. GONZALEZ, Chief Judge
 United States District Court

¹ This is Plaintiff’s first attempt to amend the complaint, so the Foman factor of “repeated failure to cure deficiencies by amendments” is inapplicable here.